sonal injuries result from a negligent failure to make repairs agreed upon, the tenant may maintain a tort action. There is a considerable body of authority for this proposition.[12] These cases necessarily proceed on the theory that the landlord owes the tenant a duty apart from contract.[13] But as the mere relationship of landlord and tenant creates no duty to repair, it is difficult to see how negligent failure to repair can give rise to a tort liability. The doctrine is also strange in that it imposes a tort liability for mere negligent omission to perform a covenant, where no such action could be maintained for a wilful breach. Some cases, refusing to follow this illogical doctrine in its entirety, have distinguished between covenants to make specific repairs or to repair generally, and covenants to keep premises in a safe and tenantable condition. In the former class of cases, no recovery in tort is allowed, even where the failure to repair was negligent; but in the latter class, since the tenant relies on the engagement to keep the premises safe, and since payment of damages for personal injuries resulting from a breach would be in the contemplation of the parties in making the contract, the landlord is held liable in tort.[14] The distinction seems unsound, for the covenant to keep the premises safe and tenantable is a mere contract like any other, for the breach of which a tort action does not lie. The recent case of *Kohnle* v. *Paxton* (Mo. 1916) 188 S. W. 155 adopts the sound view, and denies a recovery in tort where the landlord agreed to keep the premises tenantable. If the tort liability is based on the relationship, it runs counter to the proposition that the relationship carries with it no duty to repair. In attempting to explain the doctrine, it has been said that where a landlord agrees to keep the premises in a safe and tenantable condition, he is in effect reserving control of them, with nothing in the tenant but a right to use them.[15] But such a construction of the lease would defeat the intention of the parties, which is to create an estate in the tenant, with a mere incidental engagement by the landlord to keep the premises safe.

THE AFFIRMATIVE CHARGE IN CRIMINAL TRIALS.—In a civil trial where the proof is all on one side, the judge may direct a verdict for the plaintiff or the defendant, as the case may be,[1] but this power of the court is more limited in criminal trials, except in the case of

[12]Barron *v.* Liedloff, *supra*; Stillwell *v.* South Louisville Land Co. (1900) 22 Ky. Law Rep. 785, 58 S. W. 696.

[13]In Johnston *v.* Nichols (1915) 83 Wash. 394, 145 Pac. 417, the court predicates the landlord's liability on his failure to perform "some duty imposed by law or by contract". In Glynn *v.* Lyceum Theater Co. (1913) 87 Conn. 237, 87 Atl. 796, it is said that the landlord owes a duty not to be negligent, and failure to perform the contract duty to repair may in a proper case be negligent. The definitions of "negligent failure to repair" by the courts are very vague.

[14]See Miles *v.* Janvrin (1907) 196 Mass. 431, 82 N. E. 708; s. c. (1909) 200 Mass. 514, 86 N. E. 785; Cromwell *v.* Allen (1909) 151 Ill. App. 404.

[15]See Miles *v.* Janvrin, *supra*; Barron *v.* Liedloff, *supra*.

[1]See United States *v.* Taylor (C. C. 1882) 11 Fed. 470; State *v.* Riley (1893) 113 N. C. 648, 18 S. E. 168.

a special verdict.[2] The accused has a constitutional right to trial by jury in criminal cases[3] which he cannot even waive voluntarily,[4] much less involuntarily, and he has the same right to have twelve laymen pronounce on the truth or falsity of each material averment of the indictment if the evidence against him is clear and uncontradicted as he unquestionably would have if it were doubtful and conflicting.[5] By a plea of not guilty the accused denies the truth of the information or indictment and imposes on the state the burden of proving his guilt beyond a reasonable doubt.[6] The Constitution requires an actual submission of the case to the jury for their consideration and decision,[7] and it is the right of the jury to pass on the credibility of the witnesses for the prosecution, even though they are not impeached.[8] It is true that the court may direct a verdict of acquittal, just as it might grant a new trial if of the opinion that a verdict of guilty was against the evidence.[9] But a judge cannot set aside a verdict of acquittal because of the Constitutional provision against twice putting a man in jeopardy for the same offense,[10] and therefore he cannot do the same thing by an instruction for conviction before verdict.[11]

A charge that, if the jury believe the evidence beyond a reasonable doubt, they must find the defendant guilty, is less objectionable, since

---

[2]See State *v.* Riley, *supra.* The judges in England at one time claimed a more extensive power in cases of criminal libel. By law, the meaning, effect, and interpretation of all language is a matter of legal construction for the court, and hence the judges claimed that the jury could pass only on the fact of publication and the truth of the averments and innuendoes claimed in the indictment. They maintained that, when these points were established, a criminal prosecution for libel was peculiar in that the whole matter was spread on the record, and the question of guilt, as in the case of a special verdict, was a question of law for the court. But the Fox Libel Act of 1792 established the right of the jury to render a general verdict in a libel case as in other criminal cases, and similar acts have been passed in a number of our states. See discussion by Shaw, C. J., in Commonwealth *v.* Anthes (1857) 71 Mass. 185, 212.

[3]Federal Constitution, 6th Amendment.

[4]Harris *v.* People (1889) 128 Ill. 585, 21 N. E. 563.

[5]Konda *v.* United States (7 C. C. A. 1908) 166 Fed. 91.

[6]State *v.* Picker (1895) 64 Mo. App. 126.

[7]United States *v.* Taylor, *supra.*

[8]United States *v.* Taylor, *supra.*

[9]United States *v.* Fullerton (C. C. 1870) 25 Fed. Cas. No. 15, 176; Commonwealth *v.* Yost (1900) 197 Pa. 171, 46 Atl. 845.

[10]Federal Constitution, 5th Amendment.

[11]Howell *v.* People (N. Y. 1875) 5 Hun 620, aff'd 69 N. Y. 607; United States *v.* Taylor, *supra.* Undoubtedly the general rule is that the court cannot direct a verdict of guilty in a criminal case. United States *v.* Fenwick (C. C. 1839) 25 Fed. Cas. No. 15,087; State *v.* Riley, *supra*; Konda *v.* United States, *supra.* There are a few cases *contra*: United States *v.* Anthony (C. C. 1873) 24 Fed. Cas. No. 14,459; Commonwealth *v.* Brown (1905) 28 Pa. Super. Ct. 296; People *v.* Elmer (1896) 109 Mich. 493, 67 N. W. 550. But even in the last named jurisdiction it was held error to discharge the jury and direct a verdict of guilty to be entered by the clerk. People *v.* Collison (1891) 85 Mich. 105, 48 N. W. 292. In Commonwealth *v.* Brown, *supra,* the plea was former acquittal, and there were no disputed questions of fact, the only evidence offered being the record of the former trial. The judge's ruling on this plea might be defended on the ground that the construction of the record is the function of the court.

such a charge expressly leaves the question of credibility to the jury. At common law and in the federal courts, the judge has the right to advise the jury of his opinion as to the weight and effect of the evidence,[12] but a number of the states, by constitutional or statutory provisions, have forbidden any expression by the trial judge on the weight or effect of testimony.[13] Independently of such statutory provisions, however, charges to this effect have been generally upheld where all the facts and evidence point to guilt, or where the evidence is uncontroverted or admitted by the defendant.[14] Yet a number of these charges were in cases of misdemeanors not involving the question of intent,[15] and the same courts have admitted that the affirmative charge is of doubtful propriety in criminal cases.[16]

In the recent case of *Warren* v. *State* (Ala. 1916) 72 So. 624, the court upheld a charge that the jury must find the defendant guilty of murder if they believed the evidence beyond a reasonable doubt. This was on the ground that the law presumes malice from a killing with a deadly weapon, and that there was no evidence to the contrary, either in the attending circumstances or in the rebuttal evidence of the accused. The dissenting opinion maintained that the charge was erroneous, on the ground that a material fact in the case, the criminal intent, rested in inference, and that it was the province of the jury alone to draw the inference of malice from the manner of the killing. At common law, malice was presumed from the fact of the killing, and the accused was obliged to produce evidence of justification, excuse, or alleviation.[17] But the modern tendency is against maintaining the presumption to its former extent,[18] and it has even been held that the law never implies malice from any state of facts, but that such a deduction is always to be made by the jury.[19] Yet the prevailing view is that the law presumes malice from the use of a deadly weapon, and that it is then incumbent on the accused to pro-

[12]Commonwealth *v.* Child (1829) 27 Mass. 252; Johnston *v.* Commonwealth (1877) 85 Pa. 54; Simmons *v.* United States (1891) 142 U. S. 148, 12 Sup. Ct. 171.

[13]State *v.* Barry (1902) 11 N. D. 428, 92 N. W. 809. But even in such jurisdictions, the judge may state in his charge what facts are in evidence and what are not. People *v.* King (1865) 27 Cal. 507. It is frequently stated that the jury are the judges both of law and of fact in criminal cases, but this is not absolutely true. In rendering a verdict of not guilty, the criminal jury may absolutely disregard the judge's instructions as to the law, and yet there is no recourse from their decision. At common law it seems that there was no attaint against them such as was allowed in a civil case. See Commonwealth *v.* Anthes, *supra*, at p. 202. Yet a verdict of guilty may be set aside if the rulings of the trial judge were erroneous, and this must be on the theory that the jury are expected to follow the charges given. Hamilton *v.* People (1874) 29 Mich. 173, 189; United States *v.* Battiste (C. C. 1835) 24 Fed. Cas. No. 14,545.

[14]Duffy *v.* People (N. Y. 1862) 5 Park. Cr. 321; State *v.* Vines (1885) 93 N. C. 493; Derby *v.* State (1897) 60 N. J. L. 258, 37 Atl. 614; see Parrish *v.* State (1904) 139 Ala. 16, 51, 36 So. 1012, 1024.

[15]State *v.* McLain (1889) 104 N. C. 894, 10 S. E. 518; Derby *v.* State, *supra*.

[16]See Parrish *v.* State, *supra*.

[17]4 Bl. Comm. 201; see People *v.* Schryver (1870) 42 N. Y. 1.

[18]2 Chamberlayne, Modern Law of Evidence, § 1137.

[19]Buckner *v.* Commonwealth (1879) 77 Ky. 601; People *v.* Flack (1891) 125 N. Y. 324, 26 N. E. 267.

duce evidence in rebuttal, unless the evidence which proves the killing rebuts the presumption.[20] Hence it seems that the affirmative charge is justifiable under such circumstances, though it is hardly to be commended.

APPORTIONMENT BETWEEN LIFE TENANT AND REMAINDERMAN OF EXPENSES AND COST OF IMPROVEMENTS.—Where there are present and future interests in the same thing, the question of apportionment often arises. In the case of personal property, for example, the distribution of extra dividends has caused much litigation.[1] In the case of realty, disputes are frequent as to who shall bear the cost of repairs and improvements. The terms of the instrument creating the two estates are naturally controlling, if they cover the point.[2] In the absence of any definitely expressed intention on the part of the grantor, the general rule is that all ordinary expenses, such as taxes and repairs, are to be paid by the life tenant, and where property is given to a trustee, he shall charge the expense of care and management of the estate to income.[3] A life tenant has no right to recover from the remainderman for improvements voluntarily made during the continuance of the estate.[4] But when the improvements are made without his procurement by an executor or trustee, this rule does not apply.[5] So where special taxes or assessments have been levied on the property for permanent improvements, "betterments", which increase the value of the remainder, or where a substantial portion of the betterment would be enjoyed by the remainderman, the cost should be borne ratably by the life tenant and remainderman, such assessments being regarded as an encumbrance on the whole estate,[6] unless the improvement is likely to wear out during the probable existence of the life estate.[7] Even though the improvement is not permanent, it is generally held that if it is likely that it will last beyond the probable life of the life tenant the expense should be apportioned.[8]

As to the method of apportionment, the courts apply different rules, ultimately reaching the same result, some holding that the life tenant should pay the interest on the amount during his life and at his death the remainderman should pay the principal,[9] others that the

---

[20]Commonwealth *v.* Gibson (1905) 211 Pa. 546, 60 Atl. 1086; Mann *v.* State (1906) 124 Ga. 760, 53 S. E. 324; State *v.* Lane (1914) 166 N. C. 333, 81 S. E. 620.

[1]See 4 Columbia Law Rev. 130; 7 Columbia Law Rev. 344.

[2]Moseley *v.* Marshall (1860) 22 N. Y. 200.

[3]Peirce *v.* Burroughs (1878) 58 N. H. 302; Hackworth *v.* Louisville etc. Stone Co. (1899) 106 Ky. 234, 50 S. W. 33.

[4]"Such improvements must be deemed to have been made by the life tenant for his own benefit and enjoyment during the pendency of his estate." Hagan *v.* Varney (1893) 147 Ill. 281, 35 N. E. 219.

[5]See Matter of Pollock (N. Y. 1877) 3 Redf. 100, 118.

[6]Huston *v.* Tribbetts (1898) 171 Ill. 547, 49 N. E. 711; Plympton *v.* Boston Dispensary (1871) 106 Mass. 544; Bobb *v.* Wolff (1893) 54 Mo. App. 515; Moore *v.* Simonson (1895) 27 Ore. 117, 39 Pac. 1105.

[7]Raiburn *v.* Wallace (1887) 93 Mo. 326, 3 S. W. 482. A remainderman is not ordinarily chargeable for conjectural benefits which he may never receive. Wordin's Appeal (1899) 71 Conn. 531, 42 Atl. 659.

[8]Huston *v.* Tribbetts, *supra;* Bobb *v.* Wolff, *supra.*

[9]Plympton *v.* Boston Dispensary, *supra.*